Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1997

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

v.

RICHARD SABO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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HAPP

QUESTION PRESENTED

Whether the Third Circuit erred in holding—contrary to the decisions of three other Circuits—that the McCarran-Ferguson Act does not preclude a federal RICO claim alleging unfair and deceptive sales practices in the sale of life insurance policies, where (i) the alleged sales practices constitute the "business of insurance," (ii) a comprehensive state statutory and regulatory framework squarely governs the challenged conduct, and (iii) RICO provides extraordinary mandatory remedies that are not available under the comprehensive state-law framework and would upset the balance of remedies established by state lawmakers.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner Metropolitan Life Insurance Company is a mutual life insurance company organized and existing under the laws of the State of New York. It has no parent company and no non-wholly owned subsidiaries other than the following:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group, Inc.
AEW Management and Advisors, L.P.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Albany General Insurance Company Limited
Aldrich Eastman Global Investment Strategies, LLC
Aurora Limited Partnership
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
BCOP Associates L.P.
Breen Trust Company
Capital Growth Management Limited Partnership
Centennial Equities Corporation
Chart House Enterprises, Inc.
COAC Co., Inc.
Coating Technologies International, Inc.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Properties Company III, Inc.

Copley Public Partnership Holding, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors I, L.P.
Cross and Brown Associates of New Jersey, Inc.
Cross and Brown of Connecticut, Inc.
Cross and Brown Company of Georgia, Inc.
Cross and Brown Company of Maryland, Inc.
Cross and Brown Company of Missouri, Inc.
Cross and Brown Company of Ohio, Inc.
Cross and Brown Residentials, Inc.
Dan River, Inc.
Eclipse Claim Services Inc.
Eighth Copley Corp.
Federal Street Financial Advisers, Inc.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Genesis Seguros Generales, Sociedad Anonima De Seguros Y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
Haco Corp.
Harris Associates, Inc.
Harris Associates, L.P.
Harris Associates Securities, L.P.
Harris Partners, Inc.
Harris Partners L.L.C.
Interbroker, Correduria De Reaseguros, S.A.
Jurika & Voyles, Inc.
Jurika & Voyles, L.P.
Kolon-Met Life Insurance Company

LC Park Place Corporation
Lone Star Industries, Inc.
Loomis, Sayles & Company, Inc.
Loomis, Sayles & Company, L.P.
Luther's Bar-B-Q', Inc.
MC Management, Inc.
MC Management, L.P.
Mecca Software, L.L.C.
Mercadian Capital L.P.
Mercadian Funding L.P.
MetLife International Real Estate Equity Shares, Inc.
MetLife Agricultural Credit Corp.
MetLife General Insurance Agency of Ohio, Inc.
MetLife Healthcare Network of Eastern Pennsylvania
MetLife Healthcare Network of Northeast Florida
MetLife Healthcare Network of Southern Florida
MetLife Healthcare Network of Western Florida
MetLife Independent Financial Services Limited
MetLife Limited Partnership I
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Home Loans Limited
Metropolitan Life Insurance Services Limited
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Mezzanine Investment Limited Partnership - 2
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Mezzanine Investment Limited Partnership - 6
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Morguard Investments Limited
Nailite International Inc.
NEF Corporation

NEIC Holdings, Inc.
NEIC Operating Partnership, L.P.
New England Funds, L.P.
New England Funds Management, L.P.
New England Investment Associates, Inc.
New England Investment Companies, L.P.
Origenes AFJP, S.A.
Park Avenue Funding Corporation
Perseus Partners L.P.
Pesco Plus, L.C.
Pleiades Partners L.P.
Pt. MetLife Sejahtera
Public Employees Equities Services Company
R&T Asset Management, Inc.
Ralph C. Sutro, Co.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, L.P.
Reich & Tang Services, L.P.
Santander Met, S.A.
Second Income Corp.
Seventh Copley Corp.
Sixth Copley Corp.
Sixth Singleton Corp.
Seguros Genesis, S.A. (Spain)
Snyder Capital Management, Inc.
Snyder Capital Management, L.P.
Southern Health Plan Management, Inc.
Southwest Capital Company
Spa Partners L.P.
SSRM Services, Inc.
State Street Research Energy, Inc.
State Street Research Intermediate Bond Fund
State Street Research International Fixed Income Fund
State Street Research Strategic Portfolios: Aggressive
State Street Research Strategic Portfolios: Conservative

State Street Research Strategic Portfolios: Moderate
Stellar Partners L.P.
Third Income Corporation
Third Singleton Corporation
Vaughan, Nelson, Scarborough & McConnell, L.P.
VNSM, Inc.
Westpeak Investment Advisors, Inc.
Westpeak Investment Advisors, L.P.
1038624 Ontario Inc.
161397 Canada Inc.
810597 Ontario Inc.
810660 Ontario Inc.

Respondent Richard Sabo is an individual.

Gary Antonino, Joel Sherman, Ronald Schram, and the United Food Commercial Workers International Union, AFL-CIO, CLC are defendants in this case and are not participating in this petition for certiorari.

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Petitioner Metropolitan Life Insurance Company ("MetLife") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania (App. 1a-12a) has not been officially reported. The Opinion of the United States Court of Appeals for the Third Circuit (App. 15a-41a) is reported at 137 F.3d 185.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1998, and MetLife's timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 31, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, provides as follows:

§1011. Declaration of policy

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

> The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. § 41 *et seq.*], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

The relevant provisions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the Pennsylvania Unfair Insurance Practices Act ("UIPA"), 40 Pa. S. § 1171 *et seq.*, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("CPL"), 73 Pa. S. § 201-1 *et seq.*, are reproduced in Appendix E.

STATEMENT OF THE CASE

This case presents substantially the same question on which this Court recently granted certiorari in *Humana Inc. v. Forsyth*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303): whether the McCarran-Ferguson Act, which gives the states

preeminent authority to regulate the business of insurance, precludes a federal civil RICO claim where the alleged predicate acts constitute the business of insurance. The case was brought by a former MetLife sales representative who, among other claims, filed suit under RICO, asserting purported predicate acts based on allegedly deceptive insurance sales practices by MetLife in Pennsylvania.[1] (App. 17a).

The district court (Hon. Gary L. Lancaster, U.S.D.J.) granted MetLife's motion to dismiss the RICO claims on the grounds that they were precluded by the McCarran-Ferguson Act. (App. 10a) The Act exempts "the business of insurance" from any federal regulation that would "invalidate, impair, or supersede" state law, unless the federal law at issue "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The district court held that RICO does not specifically relate to the business of insurance, and that for purposes of the McCarran-Ferguson Act the alleged conduct constituted the business of insurance. (App. 5a-10a) Moreover, the district court found that "the Commonwealth of Pennsylvania has enacted 'a comprehensive system of state insurance regulation' intended to occupy the field of regulating the business of

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[1] The alleged predicate acts consist of (i) "churning," by which MetLife allegedly encouraged its sales force to accumulate commissions by inducing policyholders to use cash values in their existing policies to purchase new policies; (ii) a "50/50" insurance plan, which MetLife allegedly advertised as a retirement savings plan; and (iii) intimidation of sales representatives to induce them to participate in these allegedly fraudulent insurance sales activities. (App. 17a). Plaintiff alleged injury in the form of loss of employment and loss of client base. (*Id.*). MetLife does not concede that any of plaintiff's claims have any merit. In fact, in an earlier arbitration proceeding, plaintiff was denied relief on a claim of wrongful termination. *See Sabo v. Metropolitan Life Ins. Co.*, No. 94-307, Magistrate Judge's Report & Recommendation at 7-8 (W.D. Pa. Sept. 10, 1996).

insurance." (App. 10a) (citation omitted). The court recognized that the legislative cornerstone of that regulatory scheme is the Pennsylvania Unfair Insurance Practices Act, 40 Pa. S. § 1171 *et seq.* (the "UIPA"), which prohibits the very type of conduct alleged in plaintiff's RICO claims.[2] (App. 10a)

As the district court noted, the UIPA, unlike RICO, does not provide a private right of action; it is enforceable only by the Pennsylvania Insurance Commissioner.[3] (App. 10a) The UIPA also preserves certain common-law and statutory causes of action that existed when UIPA was enacted. UIPA § 1171.13. Those causes of action, including common-law fraud and Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. S. § 201-1 *et seq.* (the "CPL"), are part of Pennsylvania's legal and regulatory framework governing the business of insurance. Unlike RICO, neither of those causes of action provides for mandatory treble damages or attorneys' fees. The district court concluded that the application of RICO's extraordinary remedies would "invalidate, impair or supersede" Pennsylvania's comprehensive legal and

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[2] *See, e.g.*, 40 Pa. S. §§ 1171.4, 1171.5(a)(1)(i) (prohibiting deceptive trade practices); 1171.5(a)(2) (prohibiting false statements relating to the business of insurance); 1171.5(a)(8) (prohibiting insurance contracts that are not as expressed in the contracts themselves); 1171.5(a)(12) (prohibiting false or fraudulent statements relating to an application for insurance).

[3] Under the UIPA, the Commissioner is authorized to "examine and investigate the affairs of every person engaged in the business of insurance," § 1171.7, to hold administrative hearings, § 1171.8, to impose administrative penalties, including cease and desist orders and suspension or revocation of licences, § 1171.9, and to seek injunctions, § 1171.10. The Commissioner may also seek judicial imposition of civil monetary penalties for knowing violations of the UIPA. *See* § 1171.11.

regulatory system that squarely governs the alleged conduct in this case, and therefore plaintiff's RICO claim was precluded by the McCarran-Ferguson Act. (App. 10a)

The Third Circuit reversed and remanded. The Third Circuit agreed with the district court that (i) RICO does not specifically relate to the business of insurance, (ii) the predicate acts alleged by plaintiff are at the "core" of the business of insurance for McCarran-Ferguson Act purposes,[4] and (iii) Pennsylvania has enacted laws to regulate the business of insurance, including laws governing the type of sales practices alleged as predicate acts in this case. (App. 27a-29a) The Third Circuit, however, concluded that RICO would not "invalidate, impair, or supersede" Pennsylvania's insurance laws and that McCarran-Ferguson Act preclusion thus did not apply.

In reaching that conclusion, the Third Circuit held that the McCarran-Ferguson Act would displace RICO only if RICO *directly conflicts* with a specific substantive provision of Pennsylvania laws governing the business of insurance. (App. 30a-34a) Because the Third Circuit could discern no such conflict, it found no "invalidation, impairment, or supersedence, however defined, of Pennsylvania insurance

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[4] As the Third Circuit explained, "there is nothing more basically 'insurance' than the sale of an insurance contract and the insurer's unique approach in trading, advertising, or valuing that product." (App. 27a) Moreover, plaintiff, who is a former MetLife sales representative, was a "person engaged" in the business of insurance and, therefore, under the McCarran-Ferguson Act is "subject to the laws of the several States which relate to the regulation" of the business of insurance. 15 U.S.C. § 1012(a).

law."[5] (App. 34a) On March 31, 1998, the Third Circuit denied MetLife's petition for rehearing with suggestion for rehearing *en banc*. (App. 42a-43a).

REASONS FOR GRANTING THE WRIT

This petition for certiorari presents substantially the same question with respect to which this Court recently granted certiorari in *Humana Inc. v. Forsyth*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303). That question, on which there is a direct conflict in the Courts of Appeals (as well as the district courts and state courts), concerns an issue of national importance: whether the availability of a civil RICO claim to challenge allegedly deceptive practices in the sale of insurance would, in contravention of the McCarran-Ferguson Act, "invalidate, impair, or supersede" state insurance regulatory schemes that govern the same alleged conduct and provide different -- and discretionary as opposed to mandatory -- remedies.

MetLife respectfully requests that this Court grant certiorari in this case and schedule this case for oral argument on the same day as *Humana*. This case presents the conflict in the Courts of Appeals even more directly and compellingly than *Humana*.[6] Moreover, hearing the two cases together

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[5] The Third Circuit also reinstated a cause of action for defamation. (App. 39a-40a) Although MetLife believes the district court correctly dismissed that claim, the Third Circuit's ruling concerning that claim is not at issue on this certiorari petition.

[6] In his amicus brief recommending a grant of certiorari in *Humana*, the United States Solicitor General stated that *Humana* is not the "ideal vehicle" for resolving the conflict in the Courts of Appeals. According to the Solicitor General, the Ninth Circuit in *Humana* may have based its decision, at least in part, on the incorrect

(continued...)

would give the Court a broader perspective on the issues presented. The two cases arise from different factual circumstances -- the sale of life insurance in this case and the imposition of health insurance co-payments in *Humana*. The two cases also concern the effect of allowing civil RICO claims on the insurance laws of two different states. Consideration of the two cases together would afford the Court a better understanding of the issues presented and aid the Court's resolution of those issues.

The Third Circuit in this case held that the McCarran-Ferguson Act does not preclude application of RICO unless RICO *directly conflicts* with the state insurance regulatory framework. This ruling clashes with the decisions of three other Courts of Appeals (the Eighth, Sixth and Fourth Circuits) holding that the availability of the mandatory RICO remedies of treble damages and attorneys' fees would invalidate, impair, or supersede state insurance regulatory frameworks by *altering the balance* of remedies struck by state law, even if no *direct conflict* exists between state and federal law.

A writ of certiorari is appropriate where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10(a). As the Third Circuit acknowledged, the question presented here "divides sister Courts of Appeals" and is the subject of jurisprudential "disarray."

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[6] (...continued)
assumption that Nevada's insurance statutes do not provide a private right of action. *See* Brief of United States as *Amicus Curiae* at 19, *Humana Inc. v. Forsyth*, No. 97-303 (May 29, 1998). In contrast, Pennsylvania's UIPA clearly does not allow for a private right of action. *See* Point II.B *infra*. Therefore, the possible inadequacy identified by the Solicitor General of *Humana* is not present in the instant case.

(App. 17a, 30a) This conflict in the Courts of Appeals involves important matters of insurance law and federal policy. It concerns the federal invasion of an area generally reserved to the states by Congress, and the risk that imposition of the extraordinary, mandatory federal remedies available under RICO will interfere with the states' ability to regulate the business of insurance.

In enacting the McCarran-Ferguson Act, Congress intended "to restore the supremacy of the States in the realm of insurance regulation." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). With the passage of the UIPA, the Pennsylvania legislature intended to exercise the full authority granted to it by the McCarran-Ferguson Act. *See* 40 Pa. S. § 1171.2 (UIPA was intended to "regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson] act"). Accordingly, the Pennsylvania legislature explicitly intended the UIPA to occupy the field of regulating the business of insurance, free from interference by federal regulation.

In contravention of the clear legislative intent of both Congress and the Pennsylvania legislature, the Third Circuit held that the McCarran-Ferguson Act did not preclude federal regulation through RICO of the conduct alleged in this case, which is at the "core" of the business of insurance. Like the Ninth Circuit in *Humana*, the Third Circuit looked to whether RICO *directly conflicts* with a substantive state law or regulation governing insurance and sustained the RICO claims because it found no such conflict. The restrictive direct conflict analysis applied by the Third Circuit is wrongly imported from the jurisprudence of federal preemption and is contrary to the express language and intent of the McCarran-Ferguson Act. As the Eighth, Sixth, and Fourth Circuits have recognized, the statutory language -- "invalidate, impair, or supersede" -- is far broader and more encompassing than the Third Circuit's narrow

requirement of a direct "conflict," a word that is not found in the McCarran-Ferguson Act.

The Third Circuit's unduly narrow interpretation of McCarran-Ferguson's statutory language so as to allow RICO claims to be superimposed on state insurance laws will cause precisely the type of "federalization" of insurance law that the McCarran-Ferguson Act was designed to prevent and that this Court has expressly condemned. As the Third Circuit acknowledged, appellate "jurisprudence is in disarray as to the extent and meaning of invalidate, impair, or supersede under the Act." (App. 30a). This Court should grant certiorari, as it did in *Humana*, to resolve the significant conflict in the Circuit Courts and to clarify the respective roles of the state and federal governments in regulating the business of insurance.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE COURTS OF APPEALS ON THE PROPER SCOPE OF McCARRAN-FERGUSON PRECLUSION

In noting the "disarray" in appellate jurisprudence, the Third Circuit observed that Courts of Appeals have adopted conflicting approaches in determining whether the McCarran-Ferguson Act precludes RICO and other federal claims concerning the business of insurance. "One line of cases . . . looks to a direct conflict in the substantive provisions of the federal and state statutes at issue." (App. 30a). The contrary line of cases does not require direct conflict but holds instead that "RICO's expanded remedial framework" can impair, invalidate or supersede state law simply by providing greater

and more extraordinary remedies than are available under a state's insurance regulatory framework. (App. 32a).[7]

The Third Circuit in this case held that there must be a direct "conflict" between a substantive provision of state insurance law and RICO before the McCarran-Ferguson Act would preclude application of the federal statute. Because the Third Circuit could not "see" any such conflict, it found "no invalidation, impairment, or supersedence, however defined, of Pennsylvania insurance law." (App. 34a) The Ninth Circuit in *Humana*, in which this Court recently granted certiorari, also has required a direct conflict between state and federal law to trigger McCarran-Ferguson preclusion. *Humana*, 114 F.3d at 1480; *accord Merchants Home*, 50 F.3d at 1491-92.

In marked contrast to the Third and Ninth Circuits, the Eighth, Sixth and Fourth Circuits have rejected the direct conflict analysis and held that the McCarran-Ferguson Act bars RICO claims relating to the business of insurance. In *Doe v. Norwest Bank*, 107 F.3d 1297, 1307-08 (8th Cir. 1997), the Eighth Circuit concluded that imposing RICO's "extraordinary" civil sanctions of mandatory treble damages and attorneys' fees

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[7] The Third Circuit's categorization of the two contradictory lines of appellate authority combined decisions involving RICO as well as those involving other federal statutes. Only one of the three other Circuit Courts cited by the Third Circuit as adopting the direct conflict standard rendered its decision in a RICO case. *See Merchants Home Delivery Serv., Inc. v. Reliance Group Holdings, Inc.*, 50 F.3d 1486 (9th Cir.), *cert denied*, 516 U.S. 964 (1995); *see also Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998). The other two Circuit Courts' rulings involved different federal statutes. *See Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996) (Federal Deposit Insurance Act); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (Fair Housing Act).

on a state's insurance regulatory framework would "so impair the state law as to bar application of RICO," even in the absence of any "direct conflict" between the federal and state statutes.

Similarly, in *Kenty v. Bank One*, 92 F.3d 384 (6th Cir. 1996), the Sixth Circuit held that allowing RICO claims based on conduct regulated by state insurance law would "impair the regulatory framework within which [the state] expects its insurance companies to do business," by subjecting such conduct to different sanctions and remedial procedures from those the state authorizes. *Kenty*, 92 F.3d at 392. The Sixth Circuit explained that

> [t]he different liability under Ohio law for violations, as well as different standards of proof necessary to demonstrate misrepresentations, means that RICO does impair the ability of Ohio to regulate this type of behavior. In particular, RICO calls for treble damages, which Ohio law does not.

Id.

So, too, in *Ambrose v. Blue Cross & Blue Shield*, No. 95-2466, 1996 U.S. App. LEXIS 22035 (4th Cir. Aug. 27, 1996), *aff'g* 891 F. Supp. 1153 (E.D. Va. 1995), the Fourth Circuit held that the plaintiff's RICO claim was precluded by the McCarran-Ferguson Act. The Fourth Circuit concluded that allowing a RICO action based on conduct regulated by the "Unfair Trade Practices" chapter of Virginia's insurance code "would 'greatly impair the [state regulators'] ability to enforce Virginia's insurance code and, specifically, to secure from insurers settlements that are in the interest of all insureds and in the public interest as well.'" *Ambrose*, 1996 U.S. App. LEXIS 22035, at *4 (quoting *Ambrose*, 891 F. Supp. at 1166). The Fourth Circuit also stated that "because of the dramatic

disparity in the cause of action and remedies available to RICO plaintiffs, RICO would effectively supplant Virginia's chosen system of redress." *Id.*[8]

This pronounced conflict between the Courts of Appeals regarding the application of two important federal statutes merits this Court's attention. The fact that five Courts of Appeals and numerous district courts have disagreed about the relationship of the McCarran-Ferguson Act and RICO in the last three years underscores the significance of this issue. MetLife respectfully submits that this Court should grant certiorari in this case, as it did in *Humana*, to resolve the conflict between the Courts of Appeals and provide guidance to the lower courts and litigants.

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[8] In addition, before the Third Circuit's decision in this case, the majority of Pennsylvania state and federal courts that addressed the issue held that RICO claims are precluded under the McCarran-Ferguson Act. *See, e.g., Wexco Inc. v. IMC, Inc.*, 820 F. Supp. 194, 203-04 (M.D. Pa. 1993); *Senich v. Transamerica Premier Ins. Co.*, 766 F. Supp. 339, 342 (W.D. Pa. 1990); *Richhart v. Metropolitan Life Ins. Co.*, CIV. A. No. 89-1725, 1990 WL 39268, at *2-3 (E.D. Pa., Mar. 30, 1990); *Leckey v. Aetna Cas. & Sur. Co.*, 590 A.2d 1255, 1260 (Pa. Super. Ct. 1991). A substantial number of other federal district courts and state courts have reached the same conclusion. *See, e.g., Espinoza v. Union Sec. Life Ins. Co.*, Civ. A. No. 1:95-cv-453, 1996 WL 380702, at *3-5 (N.D. Ga. Jan. 24, 1996); *Avery v. Schmidt*, Civ. A. No. 93-4079, 1995 WL 562302, at *4-5 (E.D. La. Sept. 20, 1995); *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532, 542-45 (N.D. Ohio 1994); *American Int'l Group, Inc. v. Superior Court*, 285 Cal. Rptr. 765, 777 (Cal. Ct. App. 1991), *cert. denied*, 504 U.S. 911 (1992).

II. THE THIRD CIRCUIT'S DECISION ALLOWING RICO CLAIMS CONTRAVENES THE PURPOSE AND INTENT OF THE McCARRAN-FERGUSON ACT

The conflict among the Courts of Appeals concerns important matters of insurance law and federal policy: the intrusion of federal law into an area generally reserved to the states, and the interference with the states' ability to regulate the business of insurance that would result from the imposition of mandatory and severe federal RICO remedies. The Third Circuit's decision to allow federal regulation of the business of insurance contravenes the clear mandate of the McCarran-Ferguson Act that such conduct shall be regulated by the states.

The McCarran-Ferguson Act was adopted by Congress specifically in response to *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed that "[i]ssuing a policy of insurance is not a transaction of commerce," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869), and, accordingly, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). "The emergence of an interconnected and interdependent national economy, however, prompted a more expansive jurisprudential image of interstate commerce." *Fabe*, 508 U.S. at 499. In *South-Eastern Underwriters*, the Court held that an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and subject to federal regulation under the Commerce Clause. 322 U.S. at 552-53. "This result, naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 508 U.S. at 499-500.

In response, Congress in 1945 "transformed the legal landscape" by enacting the McCarran-Ferguson Act "to restore

the supremacy of the States in the realm of insurance regulation." *Id.* at 500, 507. As this Court noted in *Fabe*, Congress "achieved this purpose in two ways":

> The first "was by removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." The second "was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects."

Id. at 500 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946)); *see also SEC v. National Securities, Inc.*, 393 U.S. 453, 458, 459 (1969) (before *South-Eastern Underwriters*, "regulation of insurance transactions was thought to rest *exclusively* with the states"; "[t]he McCarran-Ferguson Act was an attempt to turn back the clock" to that regime) (emphasis added).

The broad preclusive effect that the Act is intended to have is clear from its legislative history. As this Court noted in *Fabe*, Senator Ferguson, one of the authors of the Act, explained its intended effect as follows:

> "[w]hat we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its

> wisdom, would act specifically with reference to insurance in enacting the law."

Fabe, 508 U.S. at 507 n.7 (citation omitted).

This Court has expressly recognized that the legislative purpose of the McCarran-Ferguson Act was "to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co.*, 328 U.S. at 429, and "to protect state [insurance] regulation . . . against *inadvertent* federal intrusion." *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (emphasis in original). Congress intended the McCarran-Ferguson Act to remove the business of insurance from the general operation of its Commerce Clause powers and to restore the prerogative of the states to regulate the business of insurance.

RICO is precisely the type of federal statute of general applicability that the McCarran-Ferguson Act is intended to preclude from applying to conduct which is governed by state insurance laws. RICO is a general Commerce Clause statute designed to address the "burden" on "interstate and foreign commerce" of racketeering enterprise activities. *See* Statement of Findings and Purpose, reprinted in 1970 U.S.C.C.A.N. 1073. The Third Circuit's decision allowing RICO claims impermissibly injects federal law, under the rubric of the Commerce Clause, directly into the core of the regulation of the business of insurance -- an area that Congress expressly shielded from the operation of the Commerce Clause through the McCarran-Ferguson Act.

There is nothing in RICO's legislative history to indicate that it was intended to override the McCarran-Ferguson Act's prohibition on federal intrusion into state regulation of the business of insurance. On the contrary, RICO's purpose is squarely at odds with the McCarran-Ferguson Act's intent to give states the prerogative to establish regulations governing

the business of insurance, as well as appropriate methods of enforcement and penalties for violations of those regulations.

Indeed, Pennsylvania enacted the UIPA to exercise its full regulatory authority under the McCarran-Ferguson Act, to the exclusion of federal regulation. *See* 40 Pa. S. § 1171.2 ("[t]he purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the [McCarran-Ferguson] act"). The UIPA is designed to "occupy the field of regulating the business of insurance as contemplated by" the McCarran-Ferguson Act. *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 463 (W.D. Pa. 1977), *aff'd mem.*, 571 F.2d 571 (3d Cir. 1978); *see also D'Ambrosio v. Pennsylvania Nat'l. Mut. Casualty Ins. Co.*, 431 A.2d 966, 969 (Pa. 1981) (UIPA is a "dramatic, sweeping effort" to curb bad faith conduct by insurers).[9]

In sum, by allowing RICO claims involving the business of insurance, the Third Circuit has improperly extended the operation of Congress' general Commerce Clause power into an area of state regulation that Congress has carved

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[9] Although the UIPA does not permit private litigants to enforce its provisions (App. 10a), the UIPA does expressly incorporate into its regulatory framework pre-existing common law and statutory causes of action, such as common-law fraud and CPL claims. *See* 40 Pa. S. § 1171.13; *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 58 (3d Cir. 1992). Those causes of action differ significantly from federal RICO and provide discretionary -- as opposed to mandatory -- remedies. Moreover, common law fraud in Pennsylvania requires a substantially higher burden of proof than RICO. *See* Point IV.A *infra*. Significantly, Pennsylvania's state RICO statute, 18 Pa. S. § 911 *et seq.*, does not provide a private right of action and thus is not included in the causes of action made available under the UIPA. *See D'Iorio v. Adonizio*, 554 F. Supp. 222, 232 (M.D. Pa. 1982).

out from the Commerce Clause. Permitting RICO claims in that area would impermissibly federalize insurance litigation, just as the availability of civil RICO claims in other areas "has 'quite simply revolutionize[d] private litigation'" and "'validate[d] the federalization of broad areas of state common law of frauds.'" *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 501 (1985) (Marshall, J., dissenting)). If allowed to stand, the Third Circuit's decision will damage and impair state regulation of the business of insurance, which the McCarran-Ferguson Act was intended to protect.

III. THE THIRD CIRCUIT'S CONFLICT ANALYSIS IS CONTRARY TO THE PLAIN MEANING OF THE McCARRAN-FERGUSON ACT

Like the Ninth Circuit in *Humana*, the Third Circuit in this case looked to whether RICO directly *conflicted* with a specific substantive provision of state law and sustained the plaintiff's RICO claim because it found no such conflict. (App. 30a-34a) This restrictive conflict analysis applied by the Third and Ninth Circuits is flatly inconsistent with the McCarran-Ferguson Act's express language. The test for McCarran-Ferguson preclusion is not whether a "conflict" exists. In fact, that word does not appear in the statute. Rather, under the statutory language, the relevant question is whether application of federal law would in any way "invalidate, impair, or supersede" state law. *See* 15 U.S.C. § 1012(b).

As this Court has observed, "'[t]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself.'" *Fabe*, 508 U.S. at 500 (citation omitted). Where the statute does not define its key terms, they must be given their ordinary meaning. *Asgrow*

Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995). And, when words are used in the disjunctive, each must be given its separate meaning. *Garcia v. United States*, 469 U.S. 70, 73 (1984).

Under these standard principles of statutory construction, the terms "invalidate, impair or supersede" cannot be limited to direct "conflicts." A "conflict" between two laws -- for example, where compliance with one precludes compliance with the other -- would undoubtedly result in the "invalidation" of one or the other law. But a law can be "impaired" or "superseded" even where no actual "conflict" exists.

As this Court stated more than a century ago, "the lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.'" *Edwards v. Kearzey*, 96 U.S. 595, 600 (1877) (citation omitted); *accord Doe*, 107 F.3d at 1308; *see also Black's Law Dictionary* 752 (6th ed. 1990) (defining "impair" as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner"); *Webster's Third New Int'l Dictionary* 2295 (1986) (the word "supersede" connotes making something "superfluous or unnecessary" by supplanting it with something else). An actual conflict is not required.[10]

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[10] Moreover, section 1012(b) of the McCarran-Ferguson Act includes the proviso that the Federal Trade Commission ("FTC") Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). Evidently, Congress believed that state regulation of insurance trade practices would be adversely affected by a parallel federal system of regulation and therefore excluded insurance sales and advertising practices from federal regulation by the FTC. *See Federal Trade Comm'n v. National Casualty Co.*, 357 U.S. 560, 564 (1958)

(continued...)

The "conflict" analysis applied by the Third and Ninth Circuits inappropriately utilizes principles developed under Supremacy Clause preemption jurisprudence that have no application in the McCarran-Ferguson context. In Supremacy Clause analysis, there is a "strong presumption" against the preemption of state law by federal law and in favor of the application of state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). Under Supremacy Clause analysis, preemption is found only if Congress expressly provides that state law is displaced or if state law "actually conflicts with federal law." *Id.* at 516. Viewing the question under the McCarran-Ferguson Act as whether state law actually "conflicts" with and therefore "inversely" preempts federal law improperly incorporates a similar presumption against preemption into the McCarran-Ferguson analysis. The language and history of the McCarran-Ferguson Act do not in any way support a presumption favoring the application of general federal law to the business of insurance. On the contrary, the basic purpose of the McCarran-Ferguson Act is "to reserve to the states the regulation of the 'business of insurance.'" *FMC Corp. v. Holliday*, 498 U.S. 52, 63 (1990).

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[10] (...continued)
(invalidating FTC cease and desist orders regarding insurance advertising where "[e]ach State in question ha[d] enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision"). Section 1012(b)'s proviso prohibiting application of the FTC Act illustrates the broad scope of preclusion that Congress intended under the McCarran-Ferguson Act, as well as Congress' specific judgment that regulation of insurance sales practices (such as are at issue in this case) should be left exclusively to state regulation.

As a result, the importation of Supremacy Clause preemption analysis into McCarran-Ferguson preclusion is fundamentally incorrect -- and inconsistent with the Act's purpose. *See Ambrose*, 891 F. Supp. at 1167 ("[t]he McCarran-Ferguson Act does not admit of [a preemption-type] analysis . . . because the [Act] does not turn on status, i.e., supremacy of a body of law, but on the effect of the law, i.e., whether an act of Congress 'invalidates, impairs or supersedes' certain kinds of state law.").

In applying a conflict analysis to assess McCarran-Ferguson preclusion, the Third Circuit incorrectly relied on this Court's decision in *SEC v. National Securities, Inc.*, 393 U.S. 453, 463 (1969), which held that the McCarran-Ferguson Act did not prevent the SEC from applying the federal securities laws to a merger between two insurance companies that the Arizona Director of Insurance had approved. The Third Circuit incorrectly read that decision as holding that McCarran-Ferguson preclusion does not apply where "any 'impairment'" of state regulation would be only "indirect" where "no true 'conflict' in remedies" exists. (App. 33a). That reading is not supported by the facts or legal analysis in *National Securities*.

National Securities turned on this Court's conclusion that insofar as it protected the interests of shareholders rather than policyholders, the Arizona statute at issue was *not* a "law enacted by [the] State for the purpose of regulating the business of *insurance*," 15 U.S.C. § 1012(b) (emphasis added) -- a precondition for McCarran-Ferguson preclusion. The Court explained:

> [W]e do not believe that a state statute aimed at protecting the interests of those who own stock in insurance companies comes within the sweep of the McCarran-Ferguson Act. Such a statute

> is not a state attempt to regulate "the business of insurance," as that phrase was used in the Act.

National Sec., 393 U.S. at 457; *accord id.* at 460 ("This is not insurance regulation, but securities regulation."). Two competing interests were at stake in *National Securities*: "[t]he paramount federal interest in protecting shareholders" and "the paramount state interest in protecting policyholders." *Id.* at 463.

The need to accommodate two distinct spheres of regulation (one federal, one state) is inapplicable where, as here, only a single sphere -- the one entrusted to the states -- is implicated. This Court cautioned that "[d]ifferent questions would, of course, arise if the Federal Government were attempting to regulate in the sphere reserved primarily to the states by the McCarran-Ferguson Act." *Id.*

The Pennsylvania laws at issue in this case clearly involve only the insurance relationship. (*See* App. 28a ("Nor is it disputed that the applicable Pennsylvania insurance statute is a state law enacted for the purpose of regulating the business of insurance")). Moreover, plaintiff is impermissibly attempting to use RICO to regulate conduct constituting the business of insurance.

In these circumstances, where only one area of regulation is at issue -- the laws governing insurers and their interactions with their policyholders -- the McCarran-Ferguson Act precludes federal regulation. *See National Sec.*, 393 U.S. at 460, 463 ("the relationship between the insurance company and the policyholder" is "the sphere reserved primarily to the States"); *see also Doe*, 107 F.3d at 1307 (noting that, "in contrast to *National Securities*, the federal and state statutes at issue here [RICO and state unfair insurance practices law] are directed toward the *same* end: the protection of policyholders

and prospective policyholders from fraudulent insurance practices") (emphasis added).

IV. THE THIRD CIRCUIT ERRED IN HOLDING THAT RICO'S EXTRAORDINARY, MANDATORY REMEDIES WOULD NOT IMPAIR PENNSYLVANIA INSURANCE LAW

A. RICO Remedies Are Significantly Different from Those Available under Pennsylvania Law

As this Court has recognized, civil RICO "provides for drastic remedies." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 233 (1989). Under RICO, prevailing plaintiffs are entitled to mandatory awards of treble damages and attorneys' fees. *See* 28 U.S.C. § 1964(c). Courts have characterized RICO's remedies as "'among the most severe ever enacted in a federal statute.'" *Doe*, 107 F.3d at 1307 (quoting *Ambrose*, 891 F. Supp. at 1166).

In clear contrast to federal RICO, no Pennsylvania law -- not the UIPA, not common-law fraud, not the CPL, and not the Pennsylvania RICO statute -- awards mandatory treble damages or attorneys' fees to a prevailing plaintiff. As discussed above, neither the UIPA nor Pennsylvania's state RICO statute allows a private right of action. Under Pennsylvania common law, punitive damages in fraud actions are discretionary, not mandatory. They may be awarded only where outrageous conduct is shown. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985) (punitive damages are discretionary and are available only in exceptional circumstances involving outrageous conduct). Pennsylvania common law does not authorize treble damages or attorneys' fees. *See Wexco*, 820 F. Supp. at 203-04 (Pennsylvania "common law actions do not reward plaintiffs with the treble damages. costs and attorneys fees mandated by RICO"). In

addition, a fraud claim under Pennsylvania law has a significantly higher burden of proof and different elements than a federal RICO claim. *Compare Pittsburgh Nat'l Bank v. Larson*, 507 A.2d 867, 869 (Pa. Super. 1996) (fraud requires clear and convincing proof of a material misrepresentation, scienter, justifiable reliance, and proximate cause), *with Crowe v. Henry*, 115 F.3d 294, 296-97 (5th Cir. 1997) (RICO requires proof by a mere preponderance of the evidence of a pattern of racketeering activity and use or investment of income derived therefrom in an enterprise engaged in interstate commerce).

Furthermore, in contrast to RICO, Pennsylvania's CPL does not *mandate* treble (or even double) damages or attorneys' fees. The CPL permits a court, in its *discretion*, to award damages "*up to* three times the actual damages sustained" as well as attorneys' fees. 73 Pa. S. § 201-9.2; *Sewak v. Lockhart*, 699 A.2d. *755* (Pa. Super. Ct. 1997). But a plaintiff must show that he or she is entitled to recover multiple damages and attorneys' fees, and a defendant has the right to argue that such sums are not appropriate. In awarding damages under the CPL, the court's discretion must be guided by principles similar to those governing awards of punitive damages under Pennsylvania common law. *See Johnson v. Hyundai Motor Am.*, 698 A.2d 631, 639-40 (Pa. Super. Ct. 1997) (in deciding whether to award damages under the CPL, the court should consider the outrageousness of the defendant's conduct and other factors relevant to punitive damages), *appeal denied*, 1998 Pa. LEXIS 434 (Pa. Mar. 12, 1998).

In short, RICO's remedial provisions impose extraordinary mandatory penalties that have no counterpart under Pennsylvania statutory and common law.

B. The Extraordinary Federal Remedies Provided by RICO Would Undermine State Insurance Regulation

In *Doe*, the Eighth Circuit made clear that a civil RICO claim, with its severe, mandatory remedies, could wreak "potential havoc" on a state's "carefully considered mechanism for regulating insurance companies." *See United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997) (discussing *Doe*). Allowing private litigants to seek mandatory treble damages and attorneys' fees under RICO, as the Third Circuit has done, would impair the balance that Pennsylvania law seeks to strike among the many concerns and interests underlying insurance regulation.

This Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), recognized "a State's legitimate interests in punishing unlawful conduct and deterring its repetition" within its borders. *Gore*, 517 U.S. at 568. The Pennsylvania Supreme Court has made clear that Pennsylvania's UIPA is a "legislatively-created regulatory scheme" that represents a legislative policy determination regarding the appropriate sanctions required to deter deceptive insurance sales practices. *See D'Ambrosio*, 431 A.2d at 970. That regulatory framework and Pennsylvania's legislative policy determinations would be impaired and invalidated by allowing RICO claims based on conduct regulated by the UIPA, such as the alleged sales practices at issue here. *Cf. SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 68 (1959) (in McCarran-Ferguson Act case, noting this Court's longstanding "reluctance to disturb the state regulatory schemes that are in actual effect, either by

displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements").[11]

Courts have expressly recognized the adverse effect RICO claims would have on the states' ability to regulate insurance transactions. In *Wexco*, the court held that allowing RICO claims would "upset the balance of relationships between insurance entities and insureds which are established and regulated by [UIPA] and . . . other [Pennsylvania] state laws." *Wexco*, 820 F. Supp. at 204; *see also Doe*, 107 F.3d at 1307-08.

Another "concern" articulated by the courts is that "wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief." *Blumeyer*, 114 F.3d at 768 (citing *Doe*, 107 F.3d 1306-07). In *D'Ambrosio*, the Pennsylvania Supreme Court emphasized that "'[s]tate insurance departments are intended to serve the public and handle complaints from insureds as to insurer practices on a regular basis.'" 431 A.2d at 970 (citation omitted). Allowing plaintiffs to recover treble damages and attorneys' fees pursuant to RICO would circumvent and undermine the Pennsylvania regulatory enforcement framework. It would encourage persons with complaints about insurance practices to run to the courthouse, rather than turn to the state insurance department for redress (thus hampering the department's ability to investigate). Moreover, in cases where the Pennsylvania

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[11] The Third Circuit's requirement of a "conflict" between "substantive" provisions of state and federal law disregards the clear recognition by this Court that a difference between the state and federal law in procedures, methods or remedies can significantly impair the functioning of a law or regulatory framework. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (even if a state and a federal statute have the same "ultimate goal," preemption may be found if one statute "interferes with the methods" by which the other was designed to reach this goal).

Insurance Commissioner had already made a determination as to an appropriate penalty, a private litigant could impose additional penalties in the form of mandatory treble damages and attorneys' fees under RICO -- a result that nullifies the statutory discretion vested in the Commissioner by the Pennsylvania legislature.[12] As the court explained in *Ambrose*, 891 F. Supp. at 1165:

> [t]he prospect of treble damages and attorneys fees would weaken, diminish and do serious injury to, if not nullify, [the state regulatory scheme] . . . . It would convert a system of public redress into a system of private redress.

Accord Blumeyer, 114 F.3d at 768; *Doe*, 107 F.3d at 1306-07; *Espinoza*, 1996 WL 380702, at *4.[13]

Moreover, allowing RICO claims in the insurance context would frustrate and impair Pennsylvania's regulatory goal of ensuring the financial stability of insurance companies that sell policies to state residents. *Cf. Fabe*, 508 U.S. at 513 (Kennedy, J., dissenting) (noting that all policyholders "have a vital interest in the financial strength and solvency of their insurers"). Pennsylvania, like nearly all states, has detailed, comprehensive regulations governing the financial condition of insurers doing business in the state. Those regulations require

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[12] In fact, in 1994, the Pennsylvania Insurance Department conducted a Market Conduct Examination that addressed many of the alleged insurance sales issues that plaintiff has brought before the federal court with his RICO claim. (App. 7a).

[13] Courts have also expressed concern that the availability of RICO claims would impair state regulation because an insurer that found itself the subject of an inquiry by a state insurance department might be less cooperative for fear of prejudicing its litigation position if a RICO suit should later arise. *See Doe*, 107 F.3d at 1307.

every insurance company to have sufficient capital on hand to ensure the company's ability to pay benefits to policyholders. *See* 40 Pa. S. §§ 71-72. Allowing RICO claims by policyholders based on sales practices such as those alleged as predicate acts in the present case would impermissibly frustrate such Pennsylvania regulations by subjecting insurance companies to potentially huge, unpredictable awards of mandatory treble damages and attorneys' fees based on a different standard of proof than state law would require. Moreover, permitting RICO claims against a mutual life insurance company in particular would benefit the plaintiffs at the expense of other policyholders, who are the owners of the company and the value of whose policies depends on the financial condition of the company.[14]

In sum, the Third Circuit's decision to permit RICO claims would manifestly impair Pennsylvania's regulatory framework in direct contravention of the McCarran-Ferguson Act.

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[14] *See Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950) (a mutual insurance company "is a cooperative enterprise wherein the policyholders, as members, are both insurer and insured"); *Rowen v. Le Mars Mutual Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (vacating award of punitive damages against mutual insurance company, where punitive damages would fall on innocent policyholders).

CONCLUSION

The petition for a writ of certiorari should be granted, and this case should be scheduled for oral argument on the same day as *Humana Inc. v. Forsyth*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) (No. 97-303).

Respectfully submitted

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